No. 06-1254

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Petitioner,

v.

BILLY RAY NELSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

[CAPITAL CASE]

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   a. The Court of Appeals' *en banc* opinion in *Nelson* reflects precisely the same view of the requirements of the Eighth Amendment as this Court's opinions in Abdul-Kabir *and* Brewer.

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b. Petitioner fails to separately challenge that it has waived the harmless-error defense, and the lack of any compelling justification for overlooking Petitioner's waiver independently supports the judgment below.

c. Petitioner offers no reasons why this Court should expend its limited resources addressing an issue peculiar to a statute that was repealed more than fifteen years ago and that has no practical significance either within or outside of Texas.

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QUESTIONS PRESENTED

CAPITAL CASE

1. Whether the decision of the *en banc* Court of Appeals, rejecting as objectively unreasonable the Texas Court of Criminal Appeals' treatment of Respondent's *Penry* claim, is worthy of this Court's review, given that the Court of Appeals' decision is not only consistent with, but required by, this Court's intervening decisions in *Abdul-Kabir v. Quarterman*, ___U.S.___, 127 S. Ct. 1654 (2007), and *Brewer v. Quarterman*, ___ U.S.___, 127 S. Ct. 1706 (2007)?

2. Whether this Court should review the judgment withholding harmless error review of Respondent's *Penry* claim, given that Petitioner's failure to assert any harmless error defense until the very last stage of the litigation persuaded the judge whose vote was necessary to the result below that Petitioner had waived any harmless error defense, and, as a result, no majority opinion speaks for the *en banc* Court of Appeals on this issue?

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PRIOR PROCEEDINGS

Respondent (hereafter "Mr. Nelson") has presented his claim regarding the inadequacy of the pre-1991 Texas special issues to permit meaningful consideration of his mitigating evidence of mental impairment and traumatic background at every stage in this litigation. At trial, the defense requested an instruction directing the jury to consider Mr. Nelson's "family background, mental illness, non-violent jail record, voluntary intoxication, alcoholism, drug addiction, and employment history," or any other mitigating circumstance, as "aspects of [his] character and background" which might, "in fairness or mercy," call for a life sentence.[1] This requested charge further would have instructed that jurors "independently weigh each mitigating circumstance without reference to its relationship to the Special Issues," and authorized them to "use such evidence as a basis for leniency even if [they were] persuaded ... that the answers to the Special Issues [were] 'Yes.'" *Id.* The trial court denied the request. RR VII:918.

On direct appeal, Mr. Nelson again argued that the trial court's refusal to give some supplemental instruction beyond the unadorned pre-1991 "special issues" violated his right to an individualized determination of sentence. *See Nelson v. State*, No. 71,412 (Tex. Crim. App., May 26, 1993) (portion of opinion not designated for publication), slip op. at 7 ("[A]ppellant contends the trial court's failure to give appellant's requested jury charge regarding mitigating evidence during the punishment phase ... violated *Penry v. Lynaugh*, 492 U.S. 302 (1989)").[2]

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[1] Defendant's Requested Instruction Regarding Mitigating Evidence, *State v. Nelson*, No. 8214 (118th District Court, Howard County); *see also* RR VII:917-18 (we cite record of Mr. Nelson's trial as "RR" ["Reporter's Record"], with volume and page number).

[2] Petitioner asserts that Mr. Nelson "did not request a full-effect instruction at trial nor did he argue [on direct appeal] that one was required." *See* Petition for Writ of Certiorari ("Petition") at 4 n. 3. Whatever Petitioner means by "a full-effect instruction," the record is clear that Mr. Nelson pressed both at trial and on direct appeal a *Penry*-based Eighth Amendment challenge to the former special issues as applied in his case.

Mr. Nelson renewed his *Penry* claim in state post-conviction proceedings, and the Texas Court of Criminal Appeals ("CCA") denied that claim on the merits. *Ex parte Nelson*, No. 49,886-01 (Tex. Crim. App. 2001).[3]

Mr. Nelson pursued his *Penry* claim on federal habeas; the claim was first rejected on the merits by the Court of Appeals in 2003, the court having granted a Certificate of Appealability on the issue. *Nelson v. Cockrell*, 77 Fed. Appx. 209 (5th Cir. 2003). This Court subsequently returned the *Penry* claim to the Court of Appeals for further consideration in light of *Tennard v. Dretke*, 542 U.S. 274 (2004). *Nelson v. Dretke*, 542 U.S. 934 (2004). On remand, the Court of Appeals again denied relief on the merits. *Nelson v. Dretke*, 442 F.3d 282 (5th Cir. 2006). The Court of Appeals then *sua sponte* granted *en banc* rehearing of that decision. *See Nelson*, 472 F.3d at 292.

Despite filing numerous, extensive pleadings regarding Mr. Nelson's *Penry* claim in both state and federal court over a thirteen-year period, including twice in the Court of Appeals for the Fifth Circuit, Petitioner never argued or suggested prior to *en banc* review that relief should be denied on the ground that the *Penry* error in Mr. Nelson's case could be deemed harmless. Only after the Court of Appeals decided *sua sponte* to rehear Mr. Nelson's *Penry* claim *en banc* did Petitioner assert that the *Penry* error could be deemed harmless. Even then, the entirety of Petitioner's briefing on the harmless error issue occupied just one page.[4]

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[3] The CCA's denial on the merits of Mr. Nelson's *Penry* claim in October 2001 is the relevant disposition for purposes of 28 U.S.C. § 2254(d).

[4] *See Nelson*, 472 F.3d at 314 ("The State advances this harmless-error theory for the very first time on *en banc* rehearing in a discussion that consumes less than a page of its brief; it did not argue the applicability of harmless error before this court during Nelson's original habeas appeal, before the Supreme Court on certiorari review, or before this court when we initially reconsidered Nelson's habeas appeal on remand in light of *Tennard*").

RELEVANT FACTS

Petitioner minimizes the evidence in mitigation heard by Mr. Nelson's jury, devoting just seven sentences to describing it. *See* Petition at 3-4. Because the Court of Appeals' conclusion – that the Texas Court of Criminal Appeals' rejection of Mr. Nelson's *Penry I* claim was objectively unreasonable – cannot be evaluated outside the context of the mitigating evidence actually presented, it is necessary to examine in greater detail the evidence and argument at the penalty phase of Mr. Nelson's trial.

1. As a result of psychological abuse by his mother, Mr. Nelson suffered from a severe mental disorder that triggered psychotic episodes marked by eruptions of violent rage.

The penalty phase evidence showed that Mr. Nelson's mother rejected and abandoned him as a child. From that mistreatment, he developed borderline personality disorder, a severe mental disorder marked by volcanic outbursts of anger, a pervasively negative attitude toward women, and an inability to control his destructive impulses.

Mr. Nelson's father Grady described childhood events that underlay Mr. Nelson's later emotional and psychological problems. Mr. Nelson was the second of two sons, and his mother, who had wanted a girl, completely rejected him; she "never would change him or feed him [or] anything." RR VII:904. Mr. Nelson knew he was being singled out for denial of affection. *Id.*; *id.* at 907. His parents' marriage disintegrated when Mr. Nelson was fourteen; his mother left and did not take either of the children. *Id.* at 906.[5]

The centerpiece of the defense case was the extensive testimony of psychiatrist John Hickman, M.D., who described the nature of Mr. Nelson's longstanding and severe mental

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[5] Significantly, other testimony indicated that Mr. Nelson began abusing alcohol around the same time his parents split up, *i.e.*, when he was about "13 to 14 years [old]." RR VI:843.

disorder, its origin in his childhood experiences, and its effect on his thinking and behavior. Based on a total of about nine hours of interviews and psychological testing, Dr. Hickman concluded that the "basic substrata of [Mr. Nelson's] personality" reflected "borderline personality disorder" (BPD). RR VI:840-41, 855 (evaluation and testing); *id.* at 844, 846 (diagnosis). Dr. Hickman explained that BPD is a severe condition; people suffering from it "essentially behave in a psychotic manner periodically," even though they may be quite normal "75 to 80 percent" of the time. *Id.* at 844.[6]

Dr. Hickman elaborated on how BPD affected Mr. Nelson's behavior. People suffering from BPD can be "totally oblivious to their feelings" and thus may "periodically go through an outburst of feelings" which can be very violent and destructive. *Id.* In addition, people with BPD have a diminished capacity to form relationships with others and sometimes manifest a "lack of empathy" that can be misapprehended as selfishness. *Id.* at 858-59; *id.* at 845.

Dr. Hickman emphasized that one of the signal traits of BPD is impulsivity, compounded by lack of insight into one's own illness; Mr. Nelson clearly exhibited both symptoms. *Id.* at 859, 879. Another important BPD-related feature of Mr. Nelson's behavior was his longstanding addiction to cocaine and alcohol, substances Mr. Nelson – 22 at the time of trial – had been ingesting since he was "13 or 14." RR VI:843.[7]

As a result of BPD Mr. Nelson experienced "eruptive episodes" of violent and destructive behavior, and yet would be "totally unaware of [his own] motivation." RR VI:862. Suffering

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[6] Dr. Hickman strongly rejected any suggestion that Mr. Nelson could validly be diagnosed as having antisocial personality disorder. RR VI at 847 ("nothing to warrant" such a diagnosis).

[7] Mr. Nelson's use of cocaine and alcohol was "fairly heavy;" it had "affected him psychologically" and possibly caused "minimal brain damage." RR VI:843. Dr. Hickman testified that there was "no question" that "the acid aldehyde in these substances" could well have "fried [Mr. Nelson's] brain" over time. *Id.* at 867.

from BPD and fired by "the peculiar combination of alcohol and cocaine," Mr. Nelson would essentially "become ... psychotic," "not processing reality very well at that time" and erupting with "rage and internal conflicts, especially ... toward women." *Id.* at 862-63.

Dr. Hickman viewed the murder in this case specifically as having resulted from Mr. Nelson's "lack of impulse control," with "psychiatric factors" having played a "very significant" role in triggering Mr. Nelson's violent behavior. *Id.* at 885, 887, 863, 864 (victims' injuries showed Mr. Nelson's "rage toward women"). As Dr. Hickman put it, the crime was committed during a "psychotic outburst" that left Mr. Nelson under the influence of "either a mental or physical form of duress" from his "psychological makeup." *Id.* at 894; 886-87.

Dr. Hickman surmised that Mr. Nelson developed BPD as a consequence of growing up in an environment where he was not taught to manage or control his emotions, especially anger. *Id.* at 844-45. Perhaps the strongest formative influence on Mr. Nelson in this regard was the fact that he was abandoned and mistreated by his mother. Dr. Hickman described Mr. Nelson as "psychologically abused," the product of a background featuring "a lot of trauma," "not just simply [the] disappearance of [his] mother." *Id.* at 890.[8]

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[8] Petitioner's characterization of Mr. Nelson's BPD as "treatable," *see* Petition at 3, significantly overstates the record. Although Dr. Hickman expressed hope that Mr. Nelson might "possibly" be treated, he testified that such treatment would require "two to five years" of psychotherapy "two or three times a week," which he called "standard" for treating BPD, as well as medication. *Id.* at 857, 873-74. In Dr. Hickman's view, if those criteria were not exactingly followed, "I think we can predict dangerousness." *Id.* at 874. Dr. Hickman made this point repeatedly. *See, e.g.*, RR VI:854, 857-58, 865, 872. Finally, Dr. Hickman admitted that Mr. Nelson, in the present moment as he faced sentencing, was dangerous. *See* RR VI:857 (emphasis added). This exchange well captures Dr. Hickman's candor:

> Q: (by the prosecutor): And your common sense and reason tells you, yes, he will be a future danger unless he receives treatment?"
>
> A: (Dr. Hickman): Very possible, yes.

2. At closing argument, the prosecution forcefully reminded jurors that their oaths required them to treat the special issues as posing a narrow inquiry, and discouraged the jurors from viewing Mr. Nelson's mental disorder and traumatic background as evidence of anything other than his likely future dangerousness.

At closing, the prosecutor admonished the jurors to obey their oaths to answer the special issues honestly according to the evidence, repeatedly emphasizing that even the defense's own evidence showed that Mr. Nelson was *presently* dangerous, whatever tenuous hope of future improvement might exist.

The prosecutor first expressed his fear that the jurors might not answer the special issues as the evidence demanded:

> [I]f you use your common sense and your reason, I don't think there is any doubt what you should do. [Any doubts] hinge on how fiercely you hold to the fact that you have a responsible duty to apply the evidence to these questions, period.

RR VII:922-23. Similarly, he complained that "[O]ver the second half of this trial we have been hearing a lot of Billy, Billy, Billy." *Id.* at 923. That emphasis, the prosecutor insisted, "cloud[s] the ultimate issue." *Id.* The remainder clarified his view of the "ultimate issue:"

> It is tough ...for some of you, I know, to come in here and have to look at ... this defendant ... and do what you have got to do. What the evidence tells you to do. There is no sense playing games and saying you don't know the result of your answers. We know you do. But when you were selected on this jury it was not the time to play possum, it was not the time to lie still and hope I don't come back. You are going to hear some Billy, Billy, Billy, Billy, and before this is all said and done, this whole gri[sly] horrible thing is going to be hung around the neck of his mother ... [or] some school teacher or some football coach. We are going to hang this around the neck of everybody but him. ... Well, you have a responsibility. And that responsibility is to follow the law and follow the evidence that your common sense tells you is there as plain as the nose on your face."

Id. at 923-24.

Id. at 875-76; *see also id.* at 877.

Defense counsel emphasized Dr. Hickman's testimony, but acknowledged his concession "that if Billy were to walk out of here today he possibly would be a danger ...." *Id.* at 933. On rebuttal, the prosecutor highlighted Dr. Hickman's admission that Mr. Nelson likely posed a threat of future violence:

> Hickman is Dr. Excuse. Hickman is Dr. It's Not His Fault. Hickman is also Dr. Yes. Even their witness [says], it is a possibility that he will be dangerous.

Id. at 943.

The prosecutor insisted that the jury had to find Mr. Nelson dangerous irrespective of the long-term prospects for treatment:

> Look at Special Issue Number Two .... There is not an asterisk next to that, there is not something referring you down here that says if, if, if, if. We look at that defendant the way he is *right now*, and *right now even their witness [says], yes, he may be a danger*."

Id. at 958 (emphases added). Having refocused the jurors on their oath, and the narrow plain meaning of the "dangerousness" inquiry, the prosecutor's final words were, "Steel yourselves, do what you know the evidence tells you [that] you have to do. Don't make more excuses."

SUMMARY OF ARGUMENT

Petitioner filed this cert petition while this Court was considering, in *Abdul-Kabir v. Quarterman*, No. 05-11284, and *Brewer v. Quarterman*, No. 05-11287, precisely the same question presented here: whether the Texas Court of Criminal Appeals ("CCA") had unreasonably found that the pre-1991 special issues afforded meaningful consideration to mitigating evidence of mental impairment and a troubled background. Petitioner evidently hoped that this Court would uphold the constricted view of *Penry* embraced by the Fifth Circuit panels in those cases, and thus implicitly call into question the Court of Appeals' subsequent *en*

banc decision in *Nelson*. Indeed, the very same arguments advanced as the basis for certiorari here were advanced in defense of the panel opinions in *Brewer* and *Abdul-Kabir*: that capital sentencing instructions need only provide "some consideration" to a defendant's mitigating evidence, and that the CCA's rejection of *Penry* claims on that basis was reasonable in light of this Court's decisions in *Graham v. Collins*, 506 U.S. 41 (1993) and *Johnson v. Texas*, 509 U.S. 350 (1993). *See* Brief of Respondent in *Brewer v. Quarterman*, No. 05-11287, at 15-23, 42-46; *see* Brief of Respondent in *Abdul-Kabir v. Quarterman*, No. 05-11284, at 14-22, 40-44.

In *Brewer* and *Abdul-Kabir*, decided just three weeks ago, this Court considered and squarely rejected precisely these arguments. *See Abdul-Kabir v. Quarterman*, ___U.S.___, 127 S. Ct. 1654 (2007); *Brewer v. Quarterman*, ___ U.S.___, 127 S. Ct. 1706 (2007); *see infra*. Accordingly, review is unwarranted because the Court of Appeals' decision in *Nelson* is not only consistent with, but required by, this Court's intervening decisions in those cases.

Petitioner also asks this Court to decide whether *Penry* error is amenable to harmless error analysis, notwithstanding the fact that no majority opinion for the Court of Appeals decided that issue. Judge Dennis, whose vote was necessary to the nine-judge majority deciding the case, found that Petitioner had waived any harmless error argument by having repeatedly failed to raise it prior to *en banc* rehearing. Moreover, none of the eight judges dissenting from the *en banc* court's disposition of the case mention, much less specifically object to, the decision not to apply harmless error review to Mr. Nelson's *Penry* claim. Despite this glaring procedural obstacle to this Court's review, Petitioner neither acknowledges nor provides any basis for overcoming its waiver of the harmless error defense in the proceedings below.

In this posture, it would be inappropriate for this Court to grant certiorari to decide the harmless error issue because the resolution of that question is not necessary to the disposition of

this case. Federal courts of appeals uniformly hold that a harmless error argument may be waived if not asserted in a timely and complete fashion. *See infra*. The absence of any basis for overlooking Petitioner's waiver here thus presents an insurmountable obstacle to reaching the issue on which Petitioner seeks review. In any event, the question whether an error under the long-repealed pre-1991 Texas capital sentencing scheme can be deemed harmless has no enduring significance and does not warrant the expenditure of this Court's resources. Moreover, the inapplicability of harmless error analysis to *Penry* claims follows from the nature of Penry error, in which mitigating evidence is frequently given aggravating effect, rendering the record an unreliable basis on which to gauge the effect of such error.

ARGUMENT

1. The *en banc* Court of Appeals' analysis of Mr. Nelson's *Penry I* claim is consistent with, and indeed required by, this Court's reasoning in both *Abdul-Kabir v. Quarterman*, ___ U.S.___, 127 S. Ct. 1654 (2007), and *Brewer v. Quarterman*, ___U.S.___, 127 S. Ct. 1706 (2007). *Abdul-Kabir* and *Brewer* thus foreclose any justification for this Court to review the resolution of Mr. Nelson's *Penry I* claim by the *en banc* Court of Appeals.

a. The Court of Appeals' *en banc* opinion in *Nelson* reflects precisely the same view of the requirements of the Eighth Amendment as this Court's opinions in *Abdul-Kabir* and *Brewer*.

Petitioner's dissatisfaction with the Court of Appeals' resolution of Mr. Nelson's *Penry I* claim rests on the same argument that Petitioner advanced unsuccessfully in *Abdul-Kabir* and *Brewer* – that the Eighth Amendment requires only that a capital sentencing jury be able to give "some effect" to a defendant's mitigating evidence, rather than "meaningful" or "full" effect. *See, e.g.*, Petition at i, 15, 21. 25. Petitioner likewise contends that the CCA's decision denying

Penry relief was not unreasonable on the ground that the "meaningful effect" standard was not in place at the time of the CCA's relevant decision.[9]

Three weeks ago, this Court directly addressed and rejected both of these arguments. According to this Court, the Constitution currently requires – and has been understood to require at least since *Penry I* – that capital sentencing jury instructions permit jurors to give *meaningful*, and not simply "some," effect to the defendant's mitigation in assessing his sentence:

> The rule that we reaffirm today – a rule that has been clearly established since our decision in *Penry I* – is this: Special instructions [beyond the pre-1991 Texas special issues on "deliberateness" and "future dangerousness"] are necessary when the jury could not otherwise give *meaningful effect* to a defendant's mitigating evidence. ... [S]pecial instruction is not required when mitigating evidence has only a tenuous connection – "*some* arguable relevance" – to the defendant's moral culpability. But special instruction is necessary when the defendant's evidence may have meaningful relevance to the defendant's moral culpability "beyond the scope of the special issues."

Abdul-Kabir v. Quarterman, ___ U.S.___, 127 S. Ct. 1654, 1668 n. 14 (emphases in original) (citing *Penry I*, 492 U.S. at 322-23); *see also id.* at 1664 ("[W]ell before ... *Penry I*, our cases had firmly established that sentencing juries must be able to give *meaningful consideration and effect* to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future") (emphasis added); *see also, e.g., Brewer*, 127 S. Ct. at 1710 ("[W]e have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a

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[9] Petitioner and the *en banc* Court of Appeals identify the CCA's 1994 decision on direct appeal as the relevant one for purposes of 28 U.S.C. § 2254(d). *See* Petition at 16; *see also Nelson*, 472 F.3d at 303. In Mr. Nelson's view, the relevant state court decision for AEDPA purposes is the CCA's October 2001 decision denying state post-conviction relief, which similarly rejected Mr. Nelson's *Penry* claim on the merits. Accordingly, the reasonableness of the state court decision must be evaluated not only in light of *Penry I* but also in light of this Court's emphatic statement in *Penry v. Johnson*, 532 U.S. 782, 797 (2001) ("*Penry II*"), that capital sentencing jury instructions must afford "full consideration and full effect" to the defendant's mitigating evidence.

judicial gloss on a statute, prevents a jury from giving *meaningful effect* to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence") (emphasis added); *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of whatever mitigating factors the defendant offers). As demonstrated below, the *en banc* Fifth Circuit's resolution of Mr. Nelson's *Penry* claim is squarely in line with the approach modeled by this Court in *Abdul-Kabir* and *Brewer*, and certainly presents no "compelling reason[]"for this Court's intervention. *See* Sup. Ct. R. 10.

The court below summarized its view of the relevant "clearly established law" from this Court as follows: a capital sentencing juror must "be able to express his reasoned moral response to evidence that has mitigating relevance beyond the scope of the special issues." *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006) (*en banc*). In other words, "a juror cannot be precluded from electing a sentence less than death if he believes that the mitigating evidence offered makes the defendant less morally culpable for the crime, even if he nonetheless feels compelled to answer the two special issues in the affirmative." *Id.*; *see also id.* at 303 (same).

In just the same fashion, this Court explained in *Abdul-Kabir* that while the pre-1991 special issues "provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness," they did not tell jurors what to do if they decided that the defendant, because of any other mitigating circumstances such as mental impairment or a traumatic background, "should not be executed." *Abdul-Kabir*, 127 S. Ct. at 1670 (citing *Penry I*, 492 U.S. at 324); *see also id.* (because evidence that the defendant's "dangerous character may have been the result of his rough childhood and possible neurological damage" was "not relevant to either of the special verdict questions, except, possibly, as

evidence [indicating that he] would be dangerous in the future," the special issues as applied in his case "failed to provide the jury with a vehicle for expressing its 'reasoned moral response' to that evidence"); *see also Brewer*, 127 S. Ct. at 1712 (instructions must permit jurors to give dispositive weight to the "*independent* concern that, given Brewer's troubled background, he may not be deserving of a death sentence") (emphasis added). On this point, *Nelson* adheres precisely to the requirements of *Abdul-Kabir* and *Brewer*.

The opinion of the *en banc* Court of Appeals not only embraced the same general principles as this Court articulated in *Abdul-Kabir* and *Brewer*, it applied them in the context of evidence indistinguishable in all relevant respects from the evidence in those cases. Like the defendants in those cases, Mr. Nelson offered evidence of damaging childhood deprivation and resulting adult mental disorders. This Court's opinions in *Abdul-Kabir* and *Brewer*, which held that the pre-1991 special issues were inadequate to afford meaningful consideration to the relevant mitigating qualities of such evidence, thus squarely control Mr. Nelson's case as well. There is no room to argue, after *Abdul-Kabir* and *Brewer*, that the special issues were constitutionally adequate as applied to such evidence.

b. The *en banc* Court of Appeals correctly concluded that the state courts applied *Penry I* in an objectively unreasonable manner in rejecting Mr. Nelson's *Penry I* claim.

Petitioner insists that the Court of Appeals erred in concluding that the Texas courts unreasonably applied *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*") in rejecting Nelson's *Penry I* claim. That is plainly mistaken, as *Abdul-Kabir* and *Brewer* make clear.

First, the state court ruling in *Nelson* rested primarily on the CCA's perception that Mr. Nelson's mitigating evidence did not "rise to the level" of Penry's, because the mitigating circumstances of Mr. Nelson's background were different from (and, in the CCA's view, less

severe than) the mitigating circumstances in *Penry I* itself. *See Nelson*, No. 71,412 (portion of opinion not designated for publication), slip op. at 7-8 (noting that in the lone case where the CCA had reversed for *Penry* error in the absence of evidence of mental retardation, the defendant's condition was "more severe than" Mr. Nelson's, and noting repeatedly that neither Mr. Nelson's traumatic background nor his mental impairment could "rise to the level" of Penry's). Both *Abdul-Kabir* and *Brewer* characterize such reasoning as an objectively unreasonable application of *Penry I*. *See Abdul-Kabir*, 127 S. Ct. at 1672 (finding the CCA's ruling in that case objectively unreasonable because it "ignored the fact that although [Abdul-Kabir's] mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of [his] moral culpability for precisely the same reason as Penry's. Like Penry's evidence, [the] evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence"); *Brewer*, 127 S. Ct. at 1712 ("It may well be true that Brewer's mitigating evidence was less compelling than Penry's, but, contrary to the view of the CCA, that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case").

Nor – contrary to the views of the dissenting Judges below – could the CCA have reasonably regarded Mr. Nelson's mitigating evidence as within the jury's effective reach under the "future dangerousness" question because his mental disorder was arguably "treatable." As this Court explained in *Abdul-Kabir*, "the fact that the jury could give mitigating effect to some of the experts' testimony, namely, their predictions that [Abdul-Kabir] could be expected to become less dangerous as he aged, provides no support for the conclusion that the jury understood it could give effect to other portions of the experts' testimony or that of other

witnesses." *Abdul-Kabir*, 127 S. Ct. at 1672; *see also Brewer*, 127 S. Ct. at 1713 ("The transient quality of [a particular mitigating condition] may make it more likely to fall in part within the ambit of the special issues; however, as we explained in *Penry I*, such evidence may still have 'relevance to the defendant's moral culpability beyond the scope of the special verdict questions'") (citing *Penry I*, 492 U.S. at 322). The *en banc* Court of Appeals reached the identical conclusion. *See Nelson*, 472 F.3d at 307-313 (explaining why the possibility that Mr. Nelson's mental disorder might be amenable to treatment did not remove it from *Penry I*'s ambit). To the extent that the CCA's rejection of Mr. Nelson's *Penry* claim rested on that view, *Abdul-Kabir* and *Brewer* demonstrate that it was objectively unreasonable.

Petitioner urges that the CCA's rejection of Mr. Nelson's *Penry I* claim was reasonable because this Court's opinions in *Graham v. Collins*, 506 U.S. 41 (1993), and *Johnson* would have justified a finding that the former special issues enabled jurors to consider Mr. Nelson's mental impairment and troubled background. Petition at 19-22; *see also id.* at 25 ("A reasonable state-court jurist [in 1994] would not have read [the] language of *Graham* and *Johnson* as restricted to the issue of youth," as did the *en banc* Fifth Circuit, because "[t]he pronouncements of those cases are much broader than that"). This Court has made clear, however, that it was objectively unreasonable for the CCA not to recognize that *Penry I*, rather than *Graham/Johnson*, controlled cases involving mitigating evidence like Mr. Nelson's. *See Abdul-Kabir*, 127 S. Ct. at 1673 (the CCA applied *Penry I* unreasonably when it failed to acknowledge the "vast difference between youth – a universally applicable mitigating circumstance that every juror has experienced and which necessarily is transient – and the particularized experiences of abuse and neglect" such as those in *Penry* and the present case, "which presumably most jurors

have never experienced and which affect each individual in a distinct manner").[10] The court below recognized exactly the same limits on the reach of *Johnson*; it emphasized the "unique characteristics of youth" as a mitigating circumstance, including specifically that its signature qualities are "transient" and that youth "is different in kind and in mitigating effect" from evidence of mental impairment and a traumatic background. *Nelson*, 472 F.3d at 298-99. Thus *Nelson*, like *Abdul-Kabir* and *Brewer*, recognizes that the CCA profoundly misread *Johnson*, and that this misunderstanding led it to apply *Penry I* in an objectively unreasonable manner in denying relief in cases like Mr. Nelson's.

In sum, the opinion of the *en banc* Court of Appeals below identified the same controlling legal principles as this Court's subsequent decisions in *Abdul-Kabir* and *Brewer*. Moreover, the *en banc* Court correctly applied those principles in concluding that the CCA's refusal to grant relief under *Penry I* was an objectively unreasonable interpretation of clearly established precedent. Nothing about that holding or that rationale, both of which are squarely consistent with and required by *Abdul-Kabir* and *Brewer*, justifies this Court's review.

II. The question whether *Penry* error stemming from Texas's long-repealed capital sentencing statute can be deemed harmless is not appropriately presented in this litigation and in any event is insufficiently significant to warrant this Court's review.

(a) This case is not an appropriate vehicle to assess whether *Penry* error can be deemed harmless because the State waived this defense by failing to raise it in a timely matter and, as a result, there is no majority opinion on the merits of this issue from the *en banc* Court of Appeals.

Despite Petitioner's insistence that the *en banc* Court "held" that *Penry* error is not subject to harmless-error review, review of the opinions supporting the *en banc* judgment

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[10] As Mr. Nelson has noted, *supra* note 9, the relevant state court decision for AEDPA purposes was issued in October 2001, after this Court's decision in *Penry II*.

confirms that the *en banc* Court did not decide the issue because of Petitioner's failure to timely raise the defense of harmless error. Of the seventeen judges participating in the *en banc* decision, only eight – less than a majority -- joined Judge Stewart's opinion rejecting harmless-error analysis for *Penry* claims.[11] Judge Dennis, concurring only in the judgment of the Court, concluded that Petitioner "waived its harmless effort argument by not urging it prior to th[e] *en banc* rehearing." *Nelson*, 472 F.3d at 316-17 (Dennis, J., concurring). Because Judge Dennis provides the necessary margin for the judgment, and his opinion determined that Petitioner had waived the defense of harmless error, the *en banc* decision cannot be read to have decided the merits of the harmless-error issue.

The inappropriateness of addressing Petitioner's belated harmless-error argument is also reflected in the unwillingness of any of the eight dissenting judges to mention, much less endorse, Petitioner's harmless-error defense. Four judges on the *en banc* court wrote extensive dissents addressing the appropriate reach of *Penry*,[12] and those opinions collectively occupy fifty pages. *See* Appendices to Petition for Writ of Certiorari. The failure of any of these opinions to address Petitioner's belated claim of harmlessness must be read either as agreement with Judge Dennis that Petitioner had waived the issue or agreement that harmless-error analysis is inappropriate to *Penry*. Had any of the dissenting judges believed that the defense of harmless

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[11] The eight judges are Judge Benavides, Judge Davis, Judge DeMoss, Judge Higginbotham, Judge King, Judge Prado, Judge Weiner, and Judge Stewart himself. Judge Dennis concurred in the judgment. *See Nelson*, 472 F.3d at 289 (judges participating), 316 *et seq.* (concurrence). Eight judges dissented. *See Nelson*, 472 F.3d at 337 (Jones, C.J., joined by Jolly, Smith, Barksdale, Garza, and Clement, JJ., dissenting); *id.* at 348 (Smith, J., dissenting); *id.* at 351 (Clement, J., joined by Jones, C.J., and Jolly, Smith, Barksdale, and Garza, JJ., dissenting); *id.* at 353 (Owen, J., joined by Jolly and Smith, JJ., dissenting).

[12] *See Nelson*, 472 F.3d at 337 (Jones, C.J., joined by Jolly, Smith, Barksdale, Garza, and Clement, JJ., dissenting); *id.* at 348 (Smith, J., dissenting); *id.* at 351 (Clement, J., joined by Jones, C.J., and Jolly, Smith, Barksdale, and Garza, JJ., dissenting); *id.* at 353 (Owen, J., joined by Jolly and Smith, JJ., dissenting).

error was not waived and that Mr. Nelson's *Penry* claim was subject to harmless-error review, at least one of the dissenting opinions would have registered disagreement with the *en banc* court's refusal to apply harmless-error analysis to Mr. Nelson's claim. Instead, a *majority* of the *en banc* court either rejected the harmless-error defense as waived or chose not to address it all.[13] Accordingly, Judge Stewart's analysis of the harmless-error question – speaking for only a minority of the *en banc* court – amounts to nothing more than dicta.

In such circumstances, this Court should not reach out to address a question that the *en banc* court below did not necessarily resolve in issuing its judgment. Any opinion from this Court regarding the suitability of harmless-error analysis to *Penry* would be wholly advisory if, on remand, the *en banc* court were to adhere to the view of Judge Dennis that the State had waived the defense. Despite this clear procedural and prudential impediment to this Court's review, Petitioner not only fails to justify why the Court should overlook the absence of a majority opinion on the issue for which it seeks certiorari but fails even to acknowledge the presence of the procedural impediment. If the question whether *Penry* error is amenable to harmless-error review is implicated in a sufficient number of cases to justify this Court's review, this Court should address the issue only in a case in which the defense of harmless error was properly raised, presented, and resolved so as to be dispositive of the *Penry* claim before the Court in that case.

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[13] Judge Stewart's opinion also indicates that Petitioner has waived the harmless-error defense. *See Nelson*, 472 F.3d at 314 ("The State advances this harmless-error theory for the very first time on *en banc* rehearing in a discussion that consumes less than a page of its brief; it did not argue the applicability of harmless error before this court during Nelson's original habeas appeal, before the Supreme Court on certiorari review, or before this court when we initially reconsidered Nelson's habeas appeal on remand in light of *Tennard*").

(b) Petitioner fails to separately challenge that it has waived the harmless-error defense, and the lack of any compelling justification for overlooking Petitioner's waiver independently supports the judgment below.

The petition for writ of certiorari offers no explanation for the State's failure to raise its harmless-error defense until more than a decade after Mr. Nelson presented his *Penry* claim. Mr. Nelson raised the *Penry* claim in his direct appeal of his conviction and sentence, and the Texas Court of Criminal Appeals rejected the claim on the merits. *Nelson v. Texas*, 864 S.W.2d 496 (Tex. Crim. App. 1993). Mr. Nelson also raised the claim in his state collateral attack of his sentence, and the claim was likewise rejected on the merits. *Ex parte Nelson*, No. 49,866-01 (Tex. Crim. App. 2001). Mr. Nelson pursued his *Penry* claim on federal habeas, which was first rejected by the Court of Appeals in 2003 on the merits following the court's grant of a Certificate of Appealability. *Nelson v. Texas*, 77 Fed. Appx. 209 (5th Cir. 2003). This Court subsequently returned the *Penry* claim to the Court of Appeals for further consideration in light of *Tennard v. Dretke*, 542 U.S. 274 (2004). The Court of Appeals again denied relief last year. *Nelson v. Dretke*, 442 F.3d 282 (2006).

Despite filing numerous, extensive pleadings regarding Mr. Nelson's *Penry* claim in both state and federal court over a thirteen year period, including twice in the Court of Appeals for the Fifth Circuit, Petitioner had never argued or suggested prior to *en banc* review that relief should be denied on the ground that the *Penry* error in Mr. Nelson's case could be deemed harmless. Only after the Court of Appeals decided *sua sponte* to rehear Mr. Nelson's *Penry* claim *en banc* did Petitioner assert for the very first time that the *Penry* error could be deemed harmless. Even then, Petitioner's briefing on the issue was cursory, conclusory, and without any substantial discussion of the law or facts supporting such a defense. *See Nelson*, 472 F.3d at 314.

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The federal courts have consistently and uniformly held that the defense of harmless error is waived if not timely raised and properly presented. *See, e.g., Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) ("Respondent also argues that any error in the jury instructions was harmless . . . . However, the Respondent did not make this argument in the district court, so it is waived."); *United States v. Cacioppo*, 460 F.3d 1012 (8th Cir. 2006) ("the Government did not argue that the alleged instruction error was harmless, and the failure to do so waives any right to such review"); *Lam v. Kelchner*, 304 F.3d 256, 269 (3rd Cir. 2002) ("The first flaw in the Commonwealth's harmless error argument is that it was never raised before the District Court and was therefore waived."); *see also* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 31.2, at 1512 & n.1 (5th Ed. 2005) ("Like other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense."). Moreover, even when the State raises the defense of harmless error, its failure to provide the court with a thorough account of the record to facilitate harmless-error review independently justifies an appellate court's rejection of the harmless error defense. *See, e.g., United States v. Vega Molina*, 407 F.3d 511, 524 (1st Cir. 2005) (where State made no substantial effort to explain why constitutional errors were harmless, "we choose not to do the government's homework"). Although some courts have determined that federal appellate courts retain discretion to overlook waivers of the harmless-error defense in limited circumstances, *see, e.g., United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999) (discussing factors for exercising discretion to overlook state's waiver of harmless-error argument), Judge Dennis's concurring opinion in this case emphatically concluded that such discretionary power should not be exercised to excuse the state's waiver here, especially in light of the substantial record in this case. *Nelson*, 472 F.3d at

332 (Dennis, J., concurring in the judgment) ("it is clear that this is not a case in which we should exercise our discretion to overlook the waiver" as "[t]he record in Nelson's case is substantial and the issues are complex"). Given that Petitioner offers no argument, much less any persuasive one, for this Court to review the unexceptional conclusion that Petitioner waived any claim of harmless error, this Court is not in a position to use this case as a vehicle for deciding whether *Penry* error can be deemed harmless.[14]

C. Petitioner offers no reasons why this Court should expend its limited resources addressing an issue peculiar to a statute that was repealed more than fifteen years ago and that has no practical significance either within or outside of Texas.

Even if the question whether *Penry* error is amenable to harmless-error review were properly raised and presented in this case, the question is not worthy of this Court's review. Petitioner's sole argument for the exercise of this Court's review is that the lower court in this case was wrong to withhold harmless-error review. *See, e.g.*, Petition at 27 ("[t]he court of appeals misapplied this Court's precedents"). Apart from identifying what it perceives to be error, Petitioner offers literally no grounds why this Court should spend its limited resources addressing the issue. It is axiomatic that this Court is not in the business of merely "correcting error," and that principle is especially compelling in the context of this litigation. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("The possibility that a lower

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CCA violated federal law because the CCA misread this Court's resolution of his *Penry* claims in *Smith v. Texas*, 543 U.S. 37 (2004). Petitioner Smith renounced any reliance on the proposition that *Penry* claims are immune from harmless-error analysis, *see* Smith's Petition for Writ of Certiorari at 35 n.12 ("because ... petitioner suffered harm under any standard, this Court need not resolve whether *Penry II* error falls within the class of claims exempt from harm analysis"). This Court, in reversing the CCA, accordingly did not address or decide whether harmless-error principles are applicable to *Penry* claims. *Smith II*, 550 U.S. at --- ("In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with error as described in *Penry v. Lynaugh*, 492 U.S. 302 (1989). We do not and need not address that question here.") (Souter, J., concurring).

court may have incorrectly decided a federal question is, of course, a relevant factor when this Court decides whether to exercise its discretionary certiorari jurisdiction," but the Court's certiorari jurisdiction "is designed to serve purposes broader than the correction of error in particular cases ....") The universe of *Penry* claims is necessarily a quite limited one given that *Penry* error is found only in Texas death penalty cases litigated under the Texas death sentencing statute that was repealed more than fifteen years ago. Texas death row inmates sentenced under that statute constitute a distinct and dwindling minority of those currently on Texas's death row, and only a small fraction of those inmates are litigating *Penry* claims within the Texas or federal courts. Some of those inmates have claims under both *Penry I* and *Penry II*, and this case – because it does not involve a nullification instruction – would not be a suitable vehicle for assessing whether *both Penry I* and *Penry II* claims are amenable to harmless error principles.

Moreover, the question whether *Penry* claims should be subject to harmless-error analysis is a highly-technical, statute-specific inquiry. Unlike other claims regarding a denial of individualized sentencing, *see, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the harm stemming from the inadequacy of the former Texas special issues in particular cases is not typically limited to a jury's failure to consider particular mitigating evidence. *Penry* error generally also involves, as in this case, the troubling fact that a defendant's mitigating evidence (such as difficult background or mental illness) will be considered exclusively as *aggravating*, thus enhancing rather than undermining the likelihood of a death sentence. This possibility was especially worrisome under the repealed Texas statute because, unlike most other capital jurisdictions, Texas required juries to find that defendants would be dangerous in the future as a prerequisite to sentencing them to death. As a result, the failure of the former special issues to ensure meaningful consideration of a defendant's

mitigating evidence often prompted defense counsel to withhold or present differently mitigating evidence that might well have persuaded jurors to return a sentence less than death. *Cf. Brewer*, 127 S. Ct. at 1710 (noting that Brewer's counsel, "[a]s a result of a strategic decision," "neither secured nor presented any expert psychological or psychiatric testimony" about Brewer's condition). In such circumstances, the trial record will not offer a reliable basis for ascertaining whether properly-instructed jurors would have delivered the same sentence, because much of the defendant's evidence will have been withheld or skewed in its presentation because of the defective instructions and the refusal of the trial court to modify them. In this respect, *Penry* error often distorts the record that would ordinarily serve as the basis for harmless-error review. Thus, in cases involving *Penry* error, evaluation of whether the error prejudiced the defendant emphatically *does* require difficult inquiries concerning matters that might have been, but were not, placed in evidence. *Contra* Petition at 29 ("Evaluation of whether the error prejudiced the defendant thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence.") (quoting *Rose v. Clark*, 478 U.S. 570, 579-80 & n.7 (1986)).

The absence of any compelling need for this Court to review this issue is also apparent from the fact that the issue has never before come to this Court in the eighteen years since it decided *Penry*. Literally hundreds of inmates have litigated *Penry* claims in state and federal court, and the absence of any litigation concerning the appropriateness of harmless-error analysis suggests strongly that the issue is rarely contested or dispositive in the cases that have moved through the system. It would be an odd and unwarranted expenditure of this Court's resources to address a collateral issue respecting Texas's repealed statute given that the issue has surfaced only after virtually all of the inmates sentenced under that statute are no longer on Texas's death row.

Finally, Judge Stewart's opinion for eight of the seventeen judges of the *en banc* Court of Appeals rightly concludes that *Penry* claims are not amenable to harmless-error analysis. First, as indicated *supra*, the failure of the special issues to permit meaningful consideration of mitigating evidence distorts the presentation of such evidence at trial, especially because of its *aggravating* potential under the dangerousness special issue; thus, in cases involving *Penry* error, the defect in the sentencing instructions undermines the entire proceeding, resulting in an incomplete and inadequate record on which to assess the harmfulness of the inadequacies of the special issues. Second, *Penry* error occurs only if a reviewing court determines that there a "reasonable likelihood that the jury believed that it was not permitted to consider" mitigating evidence, *Boyde v. California*, 494 U.S. 370 (1990). This Court has recently noted that the Texas courts themselves have recognized that the *Boyde* inquiry entails a finding of harm. *See Smith II*, 550 U.S. at ___ ("The Court of Criminal Appeals explained in its recent decision in *Penry v. State*, 178 S.W.3d 782 (2005), that once a state habeas petitioner establishes 'a reasonable likelihood that the jury believed that it was not permitted to consider' some mitigating evidence, he has shown that the error was not harmless and therefore is grounds for reversal.") (internal citation omitted). Third, contrary to Petitioner's argument, *Penry* error is not comparable to individualization error in cases in other states where a jury has directly answered the fundamental question whether the defendant should suffer death. Under the former Texas special issues, a jury's verdict may not represent a judgment that death is the deserved punishment in light of the defendant's moral culpability – particularly where, as here, the prosecutor repeatedly urges jurors to take the narrowest possible view of those inquiries. In the absence of a jury's judgment that death is appropriate, the deference to the verdict presupposed

by harmless-error analysis is unjustified, because there is no link between the jury's verdict and the ultimate question whether a defendant's moral culpability requires a sentence of death.

CONCLUSION

The *en banc* Court of Appeals' decision in *Nelson* and this Court's subsequent decisions in *Abdul-Kabir* and *Brewer* embrace a united vision of the scope of *Penry I*. All three decisions recognize that the Eighth Amendment requires "meaningful consideration" of a defendant's mitigating evidence and that the failure of the CCA to implement this principle was objectively unreasonable after *Penry I*. Accordingly, further review of this issue by this Court is unnecessary and unjustified.

Nor does Petitioner persuasively defend its call for this Court to decide whether *Penry* claims are amenable to harmless error review. The crucial vote supporting the *en banc* court's refusal to apply harmless error analysis to Mr. Nelson's *Penry I* claim rested on Petitioner's waiver of that argument, which Petitioner offers no reason for this Court to overlook. In view of the absence of a majority opinion addressing whether *Penry* error is amenable to harmless error analysis, as well as the insignificance of that issue at this point in time given Texas' abandonment of its pre-1991 sentencing format, this question likewise does not merit review by this Court in this case and in any event was decided correctly below.

The Court should deny *certiorari*.

Respectfully submitted,

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Member, Supreme Court Bar

NO. 06-1254

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

NATHANIEL QUARTERMAN, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

V.

BILLY RAY NELSON,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

[CAPITAL CASE]

PROOF OF SERVICE

I hereby certify that on the 15th day of May, 2007, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Edward L. Marshall, Deputy Chief, Post-Conviction Litigation Division, P. O. Box 12548, Capitol Station, Austin, TX 78711-2548. All parties required to be served have been served. I am a member of the Bar of this Court.

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COUNSEL FOR RESPONDENT
Member, Supreme Court Bar

Supreme Court of the United States

No. 06-1254

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Petitioner

v.

Billy Ray Nelson

ON CONSIDERATION of the motion of respondent for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion is granted.

June 18, 2007

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

Supreme Court of the United States

No. 06-1254

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Petitioner

v.

Billy Ray Nelson

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit, No. 02-11096.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED by this Court that the said petition is denied.

June 18, 2007

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States

By _____
Deputy